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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MICHAEL W. CROCKETT,

Petitioner,

vs.

JOHN SHIELDS, MARK FRENCH,
LARRY MOCK, PETER CARDER,
ROBERT MASKO, AND JAMES ANDREWS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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85pp

ISSUES PRESENTED FOR REVIEW

1. Will the Supreme Court provide guidance on the elements of a constitutional malicious prosecution claim?

2. Should state common law be looked to in determining what elements are applicable to constitutional malicious prosecution claim?

3. Does a prefunctionary determination of probable cause at a criminal arraignment preclude a determination of an absence of probable cause for the purpose of establishing a constitutional malicious prosecution claim when under the law of the forum state probable cause is rarely, if ever, litigated and when under the state common law applicable to malicious prosecution claims it is unlikely such a preliminary determination would be afforded preclusive effect?

4. Does a preliminary determination in a criminal prosecution claim preclude a constitutional malicious prosecution claim when subsequent facts reveal at least a question of fact as to whether probable cause ever in fact existed at all?

5. Did the District Court post-trial grant of a judgment as a matter of law and the appellate court's affirmance thereof on Petitioner's public employee free speech claim improperly elevate the speaker's motive over the public concern content

of the speech, and by shifting the focus of the context analysis to the speaker's circumstances as opposed to the circumstances to which the speech was directed?

6. Did the District Court and the Appellate Court err in their application of the *Pickering* balancing test?

7. Was the law clearly established by 1992 (sufficiently to defeat a claim of qualified immunity) that a public employee could not be punished for speaking out against criminal wrongdoing on the part of his employer?

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STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was initially filed on February 15, 2001. Appendix A. A timely Motion for Rehearing and Suggestion for Rehearing en banc was brought. On June 14, 2001, the Petition for Rehearing was denied. Appendix B. The Court of Appeal's decision is bereft of analysis and substantially adopts the lengthy Memorandum opinions of the district court as a basis for its decision to affirm a partial grant of summary judgment and to grant a post-trial judgment as a matter of law. As such, the applicable district court Memorandum opinions are included as Appendices C and D.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(l) and 28 U.S.C. §2102(c). The petition is timely under the terms of the Supreme Court Rule 13(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a public employee's (a former deputy sheriff) right to speak on issues of public concern without reprisal from a governmental employer, and the application of the doctrine of qualified immunity. As discussed below, this case is somewhat unusual in that the reprisal for the free speech not only involves adverse employment actions, but also the malicious prosecution of Petitioner on criminal charges that were improperly motivated and which were instituted or continued with an absence of probable cause and with efforts to unlawfully suppress exculpatory evidence. As such the fourth, fifth, and fourteenth amendments to the United States Constitution are also implicated. Relevant constitutional and statutory provisions are

set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner began work as a Pierce County deputy sheriff in 1977.[1] By 1988 he had been promoted to the position of sergeant of the patrol division. Petitioner generally got good performance reviews and was well-liked until respondent French became his supervisor. French had previously confronted Petitioner over a conversation he had with other deputies over French's alleged cocaine use.[2] DN 82.

In February of 1992, a new sheriff was about to be appointed. The list was narrowed to four internal candidates, Chief Steve Poythress, Chief Buck Lindsey, and Respondents French and Shields. Based on an admitted mixture of concerns over the fitness of the candidates for the position and the security of his job, Petitioner anonymously submitted the following anonymous letter to the County Council:

> February 27, 1992
> Dear Councilperson,
> I am a Deputy with the Pierce County Sheriffs Department working in Patrol. This letter is

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1 In the late 1970s, and early 1980s, Pierce County's elected Sheriff, George Janovich, was convicted and jailed on federal racketeering charges. This fact and other events led to charges in the local government ultimately going from a commission form of government to a council form of government with an elected county executive. The sheriff position went from an elected position to a position appointed by executive.

2 While not a matter of substantial issue below, it is suggested that one could conclude that the expressions of concerns about a highly ranked law enforcement official's illegal drug use is worthy of First Amendment coverage and protection.

being written anonymously because my job would be in jeopardy under the current administration. However, I feel it very important to bring out a few facts about the candidates for Sheriff. The selection of Sheriff is a positive that affects us all. Even though my opinion is only a single voice within the ranks, I know that I am speaking for a great many members of this Department.

This Department went through a very difficult and embarrassing time during the corruption years of George Janovich. It has taken a great many to live down the reputation of crooked cops and cover-ups. Unfortunately, the corruption has not faded from this Department, it has only been better covered up. There are several candidates under consideration for Sheriff. There are many covered up facts that make these individuals an embarrassment to lead this Department. I will briefly try to reveal some of these facts.

Chief Buck Lindsey. He is a carryover from the Janovich era. In the past a Chief, he destroyed a file of evidence that proved Captain Mark French was heavy into cocaine use. Numerous members of this Department were involved in the investigation and when it was done, Lindsey destroyed the file. Thus, the evidence went with it.

Chief Steve Poythress. For the year and a half or so that Poythress has been Chief, morale on this Department has deteriated [sic] at an alarming rate. He has no problems treating everyone under him less than a second class citizen. There are several law suits that will be filed by Deputies against the Department and Pierce County

because of Poythress and French. But that is just part of it. When Poythress was Captain of Detectives a couple of years ago, he physically attacked a Pierce County Judge in the judge's chambers. Poythress had his hands on the judges throat and had to be bodily pulled off the judge. This was over an argument that occurred between the judge and another Deputy. The judge was Pro-Tem Judge Gray. If I am not mistaken, Gray is married to Judge Guykema in District Court. No matter, the physical assault by a police officer on a judge is an outrage. This assault was covered up by the administration.

Captain Mark French. As previously mentioned earlier, French has a history of cocaine use while as a member of this Department. It is common knowledge among the troups [sic] and is an embarrassment to us all. An investigation was done with names, places, informants as well as evidence. The entire file was never to be seen again after being in the hands of Lindsey. French has had a couple of marriages. His last one was to a sister of another Deputy. One night, French beat up his wife severely. The assault was covered up by the administration and Captain of the Detectives at the time, Steve Poythress. Nothing was ever done for the criminal offense. However, the Deputy related to the wife handled it himself. French is not a fitting individual to be a police office let alone the Sheriff.

Hearing conversation among the ranks, John Shields and Paul Pastore are the most wanted candidates. The members of this Department would follow these two without question. I am sure they would represent us with the highest degree of professionalism. The other candidates

would only be able to dream of such leadership skills. I would have no problem with either one. However, my support goes to John Shields. He has devoted his entire career to this Department and has held every rank. He is a very qualified and strong individual that has respect from a great many members. Pastore, too, is respected by the troups [sic]. He would be a fine sheriff. It's just that he has spent very little time with us as compared to Shields. Shields has paid his dues with this department and has earned a chance to be Sheriff.

Lindsey, Poythress and French are probably the most disliked people on this Department. The distrust for these people can only be compared to the distrust during and after Janovich. If only one of these three would become Sheriff, this Department and County would suffer a great deal. It is just like if anyone of them would learn of my identity, I would no longer have a job. They would [sic] my career by any means, legal or otherwise. People are afraid to speak up and voice their opinions because of the fear of these three individuals. That to me makes for an almost unbearable working environment for us. It is hard enough being a police officer in today's society without having to live under such fear.

Please consider your appointment carefully. There is more than just the public trust that is affected by your decision. Thank you.

In ultimately vacating a jury verdict on a First Amendment free speech claim, the district court found concerns

raised in this letter to be "false," despite undisputed evidence that Chief Poythress had in fact assaulted a pro tem judge and evidence that in fact an internal investigation had been conducted into French's alleged drug use. DN 96. The investigation file on French mysteriously disappeared. The spousal abuse allegations were not directly observed, but Petitioner provided evidence to the district court that there was a reasonable factual basis for such allegations.

In an internal investigation into the letter of the author a pre-disciplinary interview was held, and Petitioner candidly admitted he wrote the letter and explained his mixed motives. In his interview, Petitioner explained:

> Q: Would you say that the letters were written more out of personal regard than. . .
>
> A: No, um because I really, I mean I think for, I mean I think we've all gone through, our department has gone through some real embarrassing times and I mention the Janovich thing, and because of a lot of, of the allegations and a lot of things that have gone one, um, I, I and again, is my only way of thinking and I want to, to make sure that there was somebody that wasn't going to, a put these things where it could be dredged up, I guess. I mean, I guess it's kind of a two fold thought process Gary.

(Emphasis added.)

Petitioner further clarified that his motives in sending the letter because he did not want the department embarrassed, and was voicing his opinion on the "candidacy" of the persons and what would be good for the agency. As punishment Petitioner

was suspended for 15 days and forced to write letters of apology. A short period of time later that Petitioner was once again thrust into the role of "whistle blower." In mid-1992, a deputy brought to Petitioner's attention that a number of members of the Department, including management, were (illegally) acquiring cable television descramblers (black boxes) which allowed its user to receive cable television pay channels without paying for of the services. Respondent French was apparently notified about this criminal activity and Petitioner directly reported the matter to Sheriff Shields. Still nothing was done. Finally, Petitioner took the issue to the internal affairs department.

During the pendency of this "black box" investigation, in September of 1992, Petitioner rented the basement of his house to Cheryl Hulsey and her two children. Ms. Hulsey and Petitioner had previously been romatically involved and she still had designs on him when she moved in. By the time of the events at issue, Ms. Hulsey had began to focus her attention on a supervisor at her work, Scott McCarron. Apparently desiring to provide Mr. McCarron a reason to allow her to move in with him, on September 26, 1992, Ms. Hulsey told him that Petitioner had engaged in acts that if true would constitute assault and indecent liberties. Mr. McCarron became upset, and reported the matter to the Sheriff's Office. That night Ms. Hulsey moved in with Mr. McCarron.

Respondents Masko and Andrews were hand picked to handle the investigation. In her interview, Ms. Hulsey was adamant the assault occurred at 11:30 a.m. Once it was learned that Petitioner had an ironclad alibi, i.e., that he was working an

overtime job as security at a bank from 9:00 a.m. to 12:30 p.m., the initial interview notes were jettisoned, and the theory that the alleged crime could have occurred anywhere from 11:30 a.m. to 1:30 p.m. was manufactured.

At approximately noon on the day in question, Ms. Hulsey called a mutual friend of her and Petitioner and left a message on her message machine. It was later asserted that the purpose of the call was to tell the mutual friend of the alleged assault. The call occurred when Petitioner was still at work. Deliberately calculated efforts were made to conceal and withhold all evidence from Petitioner that detracted from the alleged victim's credibility.

The assault had allegedly occurred on a Saturday. A fruitless search warrant was issued and executed the next day. The Petitioner was arraigned the next Monday. Under Washington criminal law the deputy prosecutor fills out and signs an "affidavit of probable cause." While under court rule a hearing can be held to challenge a determination of sufficiency of probable cause, according to un-rebutted expert testimony submitted to the district court, such procedures are rarely, if ever, invoked unless the accused is in custody. DN 129. At arraignment Petitioner was released without bond.

The criminal prosecution was transferred to an adjacent county's prosecuting attorney's office to avoid apparent conflict of interest. The criminal prosecution moved forward, and the defense was provided all the reports and materials within the prosecutor's file, i.e., discovery of the material from which the initial probable cause assertion would have been predicated on.

DN 85.

Just prior to the criminal trial, Petitioner's defense counsel mysteriously received an envelope that contained a number of reports that were not in the prosecutor's file, which provided substantial exculpatory evidence, and in the expert opinion of his defense attorney substantially drew into question the existence of probable cause. DN 85. The out-of-county deputy prosecutor, shocked by the mysterious evidence, stated on the record he would not oppose a motion to dismiss due to discovery violations. Seeking full vindication as opposed to a technical victory, Petitioner declined. His risk taking was rewarded when he was acquitted.

Petitioner sought and received a temporary disability because he was psychologically incapable of returning to work. Under applicable local, once he filed for disability his employment fell under the jurisdiction of the local disability board. DN 94. Nevertheless, Respondents Shields and French attempted to first demote then terminate Petitioner. French, who was on the local disability board, went so far as to advocate that Petitioner's benefits be retroactively reduced by the post-firing demotion or the termination. The disability board disregarded such efforts. Petitioner ultimately was awarded permanent disability benefits.

In March of 1995, the instant case was filed in the United States District Court for the Western District of Washington. Within the Complaint, Petitioner brought claims under 42 U.S.C. §1983, alleging that he had been subject to a malicious prosecution and violation of his First Amendment Right to speak

out on issues of "public concern." DN 1 & 12. Respondents answered and the case proceeded through extensive discovery. DN 13.

As trial approached the defendants below moved for summary judgment. The court granted summary judgment on Petitioner's malicious prosecution claim, but ruled factual issues existed on the First Amendment reprisal claim. In dismissing the malicious prosecution claim the court ignored the opinions of Petitioner's expert, and found Petitioner was barred by the initial determination of probable cause made at his criminal arraignment. The court found Petitioner was precluded from making a malicious prosecution claim because he lacked an essential element, probable cause. In doing so, the district court relied on the case of *Haupt v. Dillard*, 17 F3d 285, 288 (9th Cir. 1994), that applied Nevada law and determined that a criminal case probable cause determination precluded a malicious prosecution claim.

On June 6, 1997, an extensive pre-trial conference was held and the district court granted several of Defendants' Motions in Limine, effectively precluding Petitioner from presenting any evidence on Petitioner's First Amendment claim beyond the 1992 letter and its direct aftermath. No mention of the criminal investigation was permitted. The district court denied Petitioner's Motion for Reconsideration and refused to certify the issue for interlocutory appeal. DN 151. The first effort at trial resulted in a mistrial. DN 171.

Simultaneously with the Federal suit, Petitioner also pursued defamation and malicious prosecution claims against

Ms. Hulsey in State Court. A jury ultimately found for Petitioner, and against Ms. Hulsey, and awarded damages. The district court excluded any evidence from the Hulsey state court trial and its result from the retrial on Petitioner's limited First Amendment claim. DN 192. Such a ruling was issued despite the fact that at the state court trial Respondent Detective Masko admitted that Ms. Hulsey was adamant the crime occurred no later than 11:30 a.m. DN 193.

On March 29 - 31, 1999, the limited retrial was held. At the close of Petitioner's case-in-chief the district court dismissed all of the named defendant save for Respondent French. The jury returned a flawed but favorable verdict to Petitioner. The jury awarded $352,663 in economic damages, and an award of punitive damages in an amount equal to Petitioner's attorneys' fees.

Both parties sought post-trial relief. French sought JNOV. Petitioner sought adjustment of the punitive damage award or alternatively for a new trial on the issue of damages. In a complete reversal of its previous posture, the district court granted French's J.N.O.V. motion, ruled Petitioner's speech was unprotected as a matter of law, and further found French was entitled to qualified immunity. Petitioner's motion for reconsideration was denied. A timely notice of appeal was filed with the Ninth Circuit Court of Appeals. On February 15, 2001, the Court of Appeals summarily affirmed the district court's dismissal decisions.[3] Reconsideration and a request for

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3 For unknown reasons, on May 4, 2001, the appellate court issued an amended decision.

rehearing en banc was filed, and was denied on June 14, 2001.

REASONS FOR GRANTING WRIT

A. Introduction

In *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), a divided court recognized that under 42 U.S.C. §1983 a citizen may have a cause of action for malicious prosecution for an improperly motivated prosecution pursued in the absence of probable cause. The plurality opinion in *Albright* was that such a claim was theoretically based upon the Fourth Amendment but otherwise provided little additional guidance.

The instant matter, when the facts are viewed in a light most favorable to Petitioner, is replete with a prosecution on the heels of First Amendment protected conduct, concealment and fabrication of evidence, and the raw abuse of the power vested in law enforcement. This matter is an appropriate vehicle for the Supreme Court to provide guidance as to the scope and limitations of a Fourth Amendment "malicious prosecution" action pursuant to 42 U.S.C. §1983. As such, it is respectfully submitted that this case meets the criteria of Supreme Court Rule 10(c), in that it involves ". . . an important question of law that has not been, but should be, settled by [the Supreme] Court . . ."

Under the district court's opinion any preliminary determination of "probable cause," no matter how ill informed, nor subject to meaningful challenge, would defeat a malicious prosecution cause of action no matter what subsequent facts revealed on the issue. Under the Court of Appeals approach (which without explanations ignored proof that the initiating prosecutor was not fully informed), a subjective self-serving

declaration of probable cause by a charging prosecutor would defeat such a cause of action, no matter how objectively unreasonable such an assertion may be. This cannot be the law.

Further, this matter if accepted will afford the Supreme Court an opportunity to put to rest the question of which predominates in determining the protected status of public employee speech, content if the speech or the speaker's motive? The district court's decision also focused on the context of the speaker's personal circumstances, and not the context of the subject matter the speech was directed to. Such an approach is erroneous.

Qualified immunity, particularly in the public employee free speech context, has become increasingly complex and problematic. A simple review of Ninth Circuit precedent indicates a maddingly complex set of rules that are so context dependent that they offer little or no guidance. Compare *Moran v. State of Washington*, 147 F3d 839, 846 (9th Cir. 1998); *Gilbrook v. City of Westminster*, 177 F3d 839 (9th Cir. 1999); and *Keyser v. Sacramento City Unified Sch. Dst.*, ___ F3d ____ (9th Cir. 2001). Without further guidance such issues will continue to be a fertile grounds for unnecessary litigation which ultimately is a public detriment.

B. **Petitioner Should Have Been Allowed to Present His 42 U.S.C. §1983 Malicious Prosecution Claim to the Jury**

Malicious prosecution is actionable under 42 U.S.C. § 1983 because of the need to protect the " 'interest in freedom from unjustifiable and unreasonable litigation. . . .' " *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977), quoting 1 F. Harper

& F. James, *The Law of Torts*, § 4.6, at 301 (1956). A plaintiff prevails by showing that he was prosecuted with malice and without probable cause under color of state law, and that defendants prosecuted him to purposefully deny him a specific constitutional right. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). Courts generally use state common law to determine the contours of a malicious prosecution claim under 42 U.S.C. § 1983. *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996). A malicious prosecution claim can be made when a prosecution is initiated or continued in the absence of probable cause. See *Peterson v. Littlejohn*, 56 Wn.App. 1, 8, 781 P.2d 1329 (1989). A prosecutor's independent probable cause determination only affects the claim if the police officer or complaining witness makes a full and fair disclosure of all relevant facts. *Id.*

First that Petitioner was prosecuted with malice, was not disputed by Respondents. Moreover, under Washington state law, malice may be inferred from lack of probable cause. *Turngren v. King County*, 104 Wn.2d 293, 305, 705 P.2d 258 (1985). An acquittal has been deemed "prima facie" evidence of a lack of probable cause. See *Peasley v. Puget Sound Tug and Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942). Second, Petitioner established that a jury question exists as to whether there was probable cause by showing that police reports that would have established Petitioner had an ironclad alibi were concealed and falsified. Third, the district court erred in ruling that Petitioner's malicious prosecution claim was barred by collateral estoppel.

Courts define probable cause as the "'facts and

circumstances within [an] officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing that [a] suspect has committed, is committing, or is about to commit an offense.'" *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 358 (6th Cir. 1997), quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 2632, 61 L.Ed.2d 343 (1979). Here, there were many indicators that Hulsey's and McCarron's reports of Petitioner's alleged crime should not have caused reasonable officers to believe that he had committed a crime.

For example, a PCSD lieutenant testified that the initial police interviews of Hulsey and McCarron should have raised red flags, both because of the poor interviewing techniques used, and because of the style and phrasing of the responses. The lieutenant also pointed out problems with the detectives' reports and their lack of follow-up. DN 84. There was also evidence that Hulsey's demeanor on the evening of the alleged assault was not that of an assault victim. DN 89. Detectives' interview notes indicate the alleged assault occurred at 10:45 a.m., or from 10:45 a.m. to 11:30 a.m. ER 88-89. Petitioner told the detectives that he had been working until about 1:00 p.m., but they never tried to verify that alibi. Instead, they altered the time of the alleged attack to "11:30-1:30," and concealed any evidence that would have supported Petitioner's alibi. DN 85.

An officer who is aware of exculpatory facts and circumstances has a duty to disclose them to the prosecutor. *Sutkiewicz*, 110 F.3d at 358. In addition, when a factual issue exists as to whether prosecuting witnesses fully disclosed all information to the prosecutor, a *prima facie* case as to the

absence of probable cause has been established. *Turngren*, 104 Wn.2d at 305-06. Whether probable cause existed must thus be determined by a jury. *Id.* at 306. Here, a great deal of exculpatory evidence was withheld from both the prosecution and defense. ER 91-107, 128-29, 166-171, 323-34, 337-468. In fact, during the criminal trial, the prosecution told the defense it would not a oppose a motion to dismiss for discovery abuses. DN 85.

Because the officers supplied false information to the prosecutor while withholding exculpatory information, they may also be held liable for all of the harm caused to Petitioner. *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986). (The detectives' notes regarding the time of the alleged incident, discussed above, are one example of false information submitted. *See also* ER 91-107, 128-29, 149-71, 337-468.) As a general rule, arresting officers are not liable for harm occurring after charges are filed because a presumption exists that a prosecutor "exercises independent judgment regarding the existence of probable cause in filing a complaint." *Smiddy*, 803 F.2d at 1471. But when that independent judgment has been unfairly obstructed, such as when evidence shows that police officers knowingly supplied false information, the presumption is overcome and the arresting officers may be liable. *Id.; see also Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988). Prbable cause existed to prosecute Petitioner should have been decided by the jury.

C. **Collateral Estoppel Does Not Bar Petitioner from Establishing Lack of Probable Cause**

The district court ruled that principles of collateral

estoppel barred Petitioner from re-litigating the issue of probable cause. ER 481-83. For collateral estoppel to apply, four requirements must be met: identical issues; a final judgment on the merits; identity of the party against whom the doctrine is asserted; and no resulting injustice from applying the doctrine. *Hanson v. Snohomish County*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993). As the following discussion demonstrates, identity of issues does not exist here. Moreover, applying collateral estoppel would result in a serious injustice.

The district court erroneously relied on a case construing Nevada law (*Haupt v. Dillard*, 17 F.3d 285, 288 (9th Cir. 1994)); on the Nevada criminal procedure statutes at issue in *Haupt*; and on an incorrect reading of Washington Criminal Rule (CrR) 3.2. The district court wrote that:

> Washington Criminal Rule (CrR) 3.2 states, in relevant part,
>
> Before making the determination [of probable cause], the court may consider an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony, and further may examine under oath the affiant and any witnesses the affiant may produce. Sworn testimony shall be electronically or stenographically recorded. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations, and may be hearsay in whole or in part.
>
> The defendant had the type of hearing proscribed [sic] by this rule. A finding of probable cause was entered by the state court judge. The plaintiff conceded the issue and did not contest

> probable cause. The plaintiff had the opportunity to challenge probable cause at a later time and failed to do so. The state court's finding that probable cause existed is now final. Under these circumstances this Court finds that the issue was fully litigated previously.

ER 483. *Haupt* involved interpretation of Nevada's criminal procedures statutes. In Nevada, a suspect is entitled by statute to a full evidentiary hearing on the issue of probable cause. Unless it is waived by a defendant, a preliminary examination is held at which the magistrate hears evidence. Nevada Revised Statute § 171.196(2). Based on the evidence presented, the magistrate determines whether "there is probable cause to believe that an offense has been committed and that the defendant has committed it. . ." Nevada Revised Statute § 171.206. The district court's opinion in *Haupt* makes clear that this preliminary hearing "included all the adversarial type safeguards of a trial proceeding." *Haupt v. Dillard*, 794 F. Supp. 1480, 1488 (D. Nev. 1992). On appeal, the Ninth Circuit in *Haupt* therefore held that the plaintiff "had a full and fair opportunity to litigate the issue of probable cause during the course of his criminal prosecution," and was precluded from re-litigating the issue. *Haupt*, 17 F.3d at 290. But *Haupt* is distinguishable because the procedure in Nevada for establishing probable cause is very different from that in Washington.

Washington CrR 3.2 is titled "Release of Accused." It provides that if the court denies bail or attaches conditions to a personal recognizance release, a hearing is held to determine probable cause. In practice, such hearings occur very rarely, and

only if custody is an issue. ER 473-47. Petitioner was not in custody at the time of his arraignment. The transcript of his arraignment also clearly demonstrates that no hearing was held to establish the existence of probable cause. ER 475-80. Thus, the district court's statement that Petitioner "had the type of hearing [prescribed] by this rule" is clearly erroneous.

Furthermore, Washington courts do not have the authority to dismiss a case at the arraignment stage of proceedings. ER 474. A case can be dismissed for lack of probable cause only pursuant to a motion brought under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

Although a *Knapstad* motion was available to Petitioner, it would not have been appropriate given the facts of his case. Like a Fed.R.Civ.P. 12(b)(6) motion, a *Knapstad* motion concedes the truth of the facts alleged and contends that these undisputed facts do not establish that a crime has been committed. *Id.* at 356. Here, the critical point is that the facts were fabricated and the Respondents had every reason to know it.

In Washington, the issue of whether probable cause exists is not litigated. Because Petitioner did not and could not have had a full and fair opportunity to litigate this issue, the district court erred in ruling that collateral estoppel applied. In fact, Petitioner successfully sued his accuser, Ms. Hulsey, in state court, after the district court summary judgment ruling at issue here.

The district court also overlooked the portion of *Haupt* that does apply here. The *Haupt* court noted that a probable

cause determination in a prior criminal proceeding would not be dispositive of a malicious prosecution claim where defendants suppressed exculpatory evidence that came to light following that initial determination.[4] *Haupt*, 17 F.3d at 290, n.5. In such a situation, "probable cause to continue a prosecution may disappear with the discovery of new exculpatory evidence." *Id.* This is exactly the situation that occurred here.

Petitioner established that genuine issues of material fact exist regarding probable cause. Fact issues involving the elements of a plaintiff's *prima facie* case are to be decided by the jury. *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101 (8th Cir. 1988). The district court erred in dismissing his malicious prosecution claim, and it was erroneous for the Circuit Court to affirm.

D. **Petitioner Engaged In Protected Speech**

A public employee's First Amendment claim has the following elements: whether he engaged in constitutionally protected speech; whether, if protected, the speech was a substantial or motivating factor in the action taken against him; and whether the employer demonstrated that it would have taken the same action in the absence of protected activity. *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

The first element, whether the speech at issue is

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4 The Ninth Circuit recently denied a defendant's motion to dismiss under *Haupt*, noting that "*Haupt* recognized that even though the plaintiff was later bound over for trial, there could be circumstances precluding collateral estoppel." *Morley v. Walker*, 175 F.3d 756, 761(9th Cir. 1999).

protected, is a question of law and actually consists of a two-part inquiry. *Voigt v. Savell*, 70 F.3d 1552, 1559 (9th Cir. 1995). Petitioner must first show that his speech substantially involved a matter of public concern. *See Johnson v. Multnomah County*, 48 F.3d 420, 422 (9th Cir. 1995). Once this requirement is met, the burden shifts to the defendants to show that their legitimate interests outweigh his interest in freedom of speech. *See id.* Here, the district court incorrectly ruled that Petitioner's speech was not protected.[5]

1. **Petitioner's Anonymous Letter Involved Matters Of Significant Public Concern, and His Motives Are Nearly Immaterial**

Protected speech relates "to any matter of political, social, or other concern of the community. . ." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct 1684, 1689 (1983). When an employee merely speaks out on matters that "relate solely" to his "parochial concern" as an employee, no First Amendment interest is at stake. *Lambert v. Richard*, 59 F.3d 134, 136 (9th Cir. 1995). But when speech addresses a mixture of public and private concerns, it is nevertheless afforded protection. See *Thompson v. City of Starkville, Miss.*, 901 F.2d 456, 464-65 (5th Cir. 1990).

The crux of the matter is whether the speech would aid even a small segment of the public in making "informed decisions about the operation of their government." *Roe v. City*

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5 The district court specifically noted during trial that Petitioner's letter was protected speech. Tr., p. 166. The court made its comments in response to defendants' motion, at the close of plaintiff's case in chief, for judgment as a matter of law on grounds of qualified immunity.

and County of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997). The focus must be upon whether the public or community is likely to be truly interested in the particular expression, or whether it is more properly perceived as essentially a private grievance.[6] This standard does not require the communication to be of global importance or "vital to survival of Western Civilization." *Id.* Petitioner met and exceeded these standards.

In determining whether speech is protected, content is the most important factor. *Johnson*, 48 F.3d at 425. Speech addressing actual or potential wrongdoing by public officials constitutes a matter of "public concern." *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996). See also *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988) (speech that discloses "any evidence of corruption, impropriety or other malfeasance . . ." clearly involves matters of "public concern.") Petitioner's letter raised allegations of possible wrongdoing and is therefore protected.

Respondents argued, and the court ruled, that because the allegations raised in Petitioner's letter were not true, the letter was not protected speech. That position is contrary to established Ninth Circuit law. Even "recklessly false statements" are protected if they otherwise relate to an issue of "public concern." See *Johnson*, 48 F.3d at 424. See also *Moran v. State*, 147 F.3d 839 (9th Cir. 1998). The very fact that the allegations raised in the letter existed and had been investigated and were still of concern to a member of the rank and file is a

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6 When speech is made in a public forum, protection can be easily found. *See Roe*, 109 F.3d at 585. Petitioner's anonymous letter to the County Council was targeted to a public forum.

reflection of public concern. *See* Tr., p. 211-13.

Petitioner's letter also raised serious issues about the qualifications and competency of candidates for sheriff and the morale of deputies, clearly issues of interest to the public. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (competency of police force is surely a matter of great public concern). Petitioner's advocacy was directed at the county council, which was poised to select a sheriff, a decision with serious consequences to Petitioner, to the community, and to the department. Such a context "underlines" the public nature of the controversy. *See Lambert*, 59 F.3d at 137.

Similarly, support of a political candidate of one's choice is inevitably a matter of public concern that rarely can be outweighed by governmental interest. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). Here, although the sheriff was to be appointed rather than elected, a public process was involved, and similar considerations must come into play. The district court incorrectly elevated Petitioner's alleged "motives" over content. *See Johnson*, 48 F.3d at 424; *Havekost v. Department of Navy*, 925 F.2d 316, 318 (9th Cir. 1991). [7]

The Seventh Circuit has clarified that the speaker's motives play only a minimal role, and speech by content is protected even if it arises out of an employment dispute in which the speaker had a personal interest. *Zorzi v. County of Putman*, 30 F.3d 885, 897 (7th Cir. 1994). Considering that speech is

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7 Seventh Circuit precedent is not contrary. In fact, the same proposition is espoused by *Breuer v. Hart*, 909 F.2d 1035 (7th Cir. 1990), an opinion heavily relied upon by the district court.

objectively examined and can be about a matter of public concern even if that is an unintended consequence, it makes little logical sense to hold the speaker's motives above the message being conveyed. *See Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993). The jury sided with Petitioner in part because French was more concerned with "taking care of" the messenger than with hearing his message.

The district court's delinquent concern that Petitioner's speech was an effort by an employee with work problems to insulate himself with Constitutional protections has little relevancy to the protected status of his speech and goes directly to a *Mt. Healthy* defense that the same adverse action would have been taken even in the absence of protected speech. *See Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 568. The defendant has the burden of proof on such a defense. *Id.* The affirmative defense is a factual issue for a jury to decide. See *Gillette v. Delmore*, 886 F.2d 1194, 1198 (9th Cir. 1989). In this case, the defense failed to include this defense in its pretrial order and therefore waived the issue. ER 617-18.

Because Petitioner's anonymous letter clearly addressed matters of public concern, the trial court erred in ruling that it was not protected speech.

2. Even if the *Pickering* Balancing Test Was at Issue, French Failed to meet His Burden of Proof

Once it is established that speech addresses a matter of public concern, the government's interest in its operations must be balanced against such speech. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35 (1968). The burden of proof is on the government to establish that its

interests outweigh those of the employee. *See Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2896, 97 L.Ed.2d (1987). When determining the government's interest, the following factors are considered: whether the speech (i) impairs discipline or control by superiors, (ii) disrupts co-worker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operation of the office. The "manner, time, and place" in which the speech occurred also constitute relevant considerations. *Rendish v. City of Tacoma*, 123 F.3d 1216, 1224-25 (9th Cir. 1997). In meeting this burden, the government must produce particularized, non-conclusory evidence of real (not imagined) disruption, or show that a reasonable prediction of disruption existed as a result of the speech at issue. *Pescio v. City of New York Dept. of Personnel*, 933 F.2d at 1149, 1159-60 (2nd Cir. 1991); *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992). No testimony was elicited at trial to satisfy any of these five factors; in fact, since the district court had ruled that Petitioner's letter was protected speech no such testimony was required. Tr., p. 166. The district court had no basis for determining that "the close working relationships in the Sheriff's Department were affected by the letter." ER 675.

In a case that is legally, factually and procedurally similar, the Ninth Circuit reversed a district court's grant of a motion for judgment as a matter of law. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 870(9th Cir. 1999). *Gilbrook* involved firefighters who alleged retaliation by their employer, for exercise of First Amendment rights. *Id.* at 847. At issue on

appeal was one plaintiff's statement that a tragic fire " 'is the direct result of the Mayor and [City] Council placing politics above the safety of the people.' " *Id.* at 865. The Ninth Circuit weighed the factors listed above, noting that "no single factor is dispositive," and concluded that the city's interests in its operation did not outweigh the plaintiff's free speech rights. *Id.* at 867-70.

The same arguments have been made in this case and in *Gilbrook*. In both cases, defendants argued that the statements at issue were made with reckless disregard for the truth. The *Gilbrook* court noted that while recklessness may be taken into account, the employer must show that actual injury resulted. *Id.* at 869. No such injury was found in *Gilbrook*; similarly, none occurred here. Defendants in both cases also relied on predictions that the speech would disrupt the employer's operations. The *Gilbrook* court was "unpersuaded that such a prediction of disruption was reasonable . . . ." *Id.* Similarly, French's predictions of disruption cannot suffice to remove Petitioner's letter from the realm of protected speech. This is particularly so given that any disruption which occurred was a result of the efforts to uncover the author of the (temporarily) anonymous letter.

The fact that the allegations of French's suspected drug use raised by Petitioner had previously been subject to investigation by three (3) different sheriff administrations (Tr., p. 211-13) simply underscores the *de minimis* impact Petitioner's reiteration of the allegations would have had. Given the importance of the subject matter of Petitioner's speech, even if some disruption could be established it would not outweigh his

right to speak. *See id.* at 867 (noting that the more tightly the First Amendment embraces speech, the stronger must be the showing of workplace disruption). The allegations regarding the other sheriff candidates were true.

French did not prove that any disruption occurred, and any prediction of disruption is not reasonable. As in *Gilbrook*, the district court's finding that the speech at issue was not protected was erroneous.

3. French was not Entitled to Qualified Immunity

The district court also erred in ruling as a basis for granting JNOV that French was entitled to qualified immunity. Whether a public official is entitled to qualified immunity in a claim under 42 U.S.C. § 1983 generally involves a question of law and is reviewed *de novo*. *Gilbrook*, 177 F.3d at 865.

This Court has noted that a public employee's right to be free from retaliatory adverse employment decisions in response to an exercise of First Amendment rights is "clearly established" law. *Rankin*, 483 U.S. at 383, 107 S.Ct. at 2896. A number of Ninth Circuit cases have found public employee First Amendment rights to be clearly established. *Lambert*, 59 F.3d 134 (9th Cir. 1995); *Hyland*, 972 F.2d at 1137; *Burgess v. Pierce County*, 918 F.2d 104, 107 (9th Cir. 1990); and *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987). As recently clarified by the Supreme Court, it takes very little decisional law (if any) before a constitutional right becomes "clearly established." *United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 1227, 137 L.Ed.2d 432 (1997). Petitioner's right to be free of retaliation after expressing concerns about his department's next sheriff was clearly established, as the district court acknowledged

throughout the lengthy course of this litigation.[8] (*See*, e.g., Tr., p. 166, ER 482) What changed?

Once it is found that the law was "clearly established," the remaining question is whether a reasonable official would have believed his conduct was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). This court has recently denied qualified immunity under this prong of the test in two First Amendment cases. *See Gilbrook*, 177 F.3d at 870; *Nunez v. Davis*, 169 F.3d 1222, 1230 (9th Cir. 1999). As in this case, the defendants in *Gilbrook* and *Nunez* argued during or after trial that they were entitled to qualified immunity. *Gilbrook*, 177 F.3d at 851, 865; *Nunez*, 169 F.3d at 1226. Those cases are instructive because this court focused on the trial testimony regarding the *Pickering* balancing test discussed above. The *Nunez* court noted that the jury had found the employer's testimony of disruption not credible and his purported reasons for terminating the plaintiff pretextual. *Nunez*, 169 F.3d at 1229-30. "Because the jury found that Nunez was fired for her speech and not for the other reasons Davis offered, Davis could not have reasonably believed that Nunez's dismissal was proper." *Id.* at 1230. Similarly, the *Gilbrook* court

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8 In deciding this issue in favor of French, the district court relied heavily on *Moran v. State*, 147 F.3d 839 (9th Cir. 1998). But *Moran* is inconsistent with *Lanier* and applies to only highly paid public officials. Moreover, the Supreme Court has recently indicated that First Amendment claims are not to be subjected to any stricter treatment for qualified immunity purposes than any other claim. *See Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). *Moran* was recently limited by the *Keyser* opinion to apply only to high ranking officials.

concluded that "the *Pickering* balance so clearly weighs in favor of [plaintiff] that it was patently unreasonable for defendants to conclude that the First Amendment did not protect his speech." *Gilbrook*, 177 F.3d at 870.

Here, as noted above, there was no testimony related to the *Pickering* balancing test because the court had already determined that petitioner's letter was protected speech. Nothing changed between the time of that determination and the time of French's motion for JNOV. These facts underscore the impropriety of the district court's ruling. Here, as in *Nunez*, the jury did not believe the employer's testimony that no retaliation occurred. The same result - no qualified immunity- should apply here.

To be entitled to qualified immunity, a defendant must establish that his conduct was reasonable under the circumstances. *Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1996). Since French failed to meet this burden at either summary judgment[9] or at trial,[10] the district court erred in

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9 The United States Supreme Court has stressed "the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). The Ninth Circuit agrees. *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996). Here, defendants did not raise qualified immunity in their motion for summary judgment. Since "[a] party seeking to defeat a motion for summary judgment is required to 'wheel out all its artillery to defeat it,' " the same must be true for a party moving for summary judgment. *See Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). "Belated factual or legal attacks are viewed with great suspicion." *Id.*

10 It was incumbent on the defense to propound special interrogatories to the jury to determine the facts on which French believed the issue of immunity

granting qualified immunity after trial. No reasonable public official would think reporting illegal conduct on the part of candidates for sheriff would not be subject to protection.

CONCLUSION

Our Constitution is the final check against abuses of governmental power. Petitioner at so many levels has been a victim of the raw abuse of the awesome powers we place in the hands of police. The pursuit of meritless criminal charges against someone who blew the whistle on public corruption is deplorable.

For the reasons stated above, it is humbly requested that a writ of certiorari issue, and/or reversal, and that Petitioner be provided an opportunity for justice from a jury of his peers.

Dated this 6th day of November, 2001.

RESPECTFULLY SUBMITTED:
LAW OFFICE OF HUGH J. McGAVICK
Counsel for Petitioner
Paul Lindenmuth
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(360) 438-0212

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would turn. Having failed to do so, defendant waived the defense. *See* Fed.R.Civ.P. 49(a) (providing that a party waives the right to trial of any issue not submitted to the jury if it fails to object to the omission). *See also Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 6 (1st Cir. 1998).

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL W. CROCKETT, Plaintiff-Appellant, v. JOHN SHIELDS, MARK FRENCH, LARRY MOCK, PETER CARDER, ROBERT MASKO, AND JAMES ANDREWS, Defendants-Appellees.	)	No. 99-35687 DC No. CV-95-5062-FDB AMENDED MEMORANDUM*

Appeal from the United States District Court
For the Western District of Montana
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted February 7, 2001
Seattle, Washington

Filed February 15, 2001
Amended May 4, 2001

Before: RYMER, THOMAS and McKEOWN, Circuit Judges.

Michael Crockett ("Crockett") appeals from the judgment as a matter of law entered by the district court and numerous other pre-trial orders. We affirm. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

1. The district court did not err in refusing to allow Crockett to add Pierce County ("County") as a defendant. The Sheriff of Pierce County, who made the termination decision in this case, was not the final policy maker with respect to personnel administration within the county; the civil service commission has that authority. Wash.Rev. Code §41.14.060; cf. Davis v. Mason County, 927 F.2d 1473, 1480-81 (9th Cir. 1991) (holding that sheriffs in Washington are, on the other hand, policymakers for peace officer training). The County, therefore, is not liable under §1983 as a matter of law. See

Christie v. Iopa, 176 F.3d 1231, 1235 (9th Cir. 1999). Thus, the district court correctly reasoned that joinder of the County would be futile.

2. Because the prosecuting attorney exercised independent judgment in proceeding with the criminal action against Crockett, even after learning of the evidence Crockett claims exculpated him, the officers who were involved in the investigation and arrest are immune from § 1983 liability for their actions. See Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981). Crockett has produced no evidence that the prosecutor's judgment was not independently made, or that new exculpatory evidence surfaced after the probable cause determination. Thus, we affirm the summary judgment dismissal of Crockett's malicious prosecution claim.

3. The district court did not abuse its discretion in granting the motions in limine. The nexus between Crockett's letter and the criminal investigation arising out of Hulsey's allegations was too attenuated to make the proffered evidence

relevant.

4. The district court did not err in granting judgment as a matter of law in favor of Mark French ("French") because it correctly concluded that no reasonable jury could have found that French's participation in the investigation of the letter had any effect on the disciplinary action ultimately taken against Crockett. Although a jury could have determined that French gave his own "personal" file on Crockett to the inspector in order to retaliate against Crockett, it could have been linked that participation to the discipline carried out by Sheriff Shields. Taking the evidence in the light most favorable to Crockett, any causal link was purely speculative.

5. The district court did not err in awarding costs to the five defendants who were dismissed for lack of evidence linking them to the discipline imposed on Crockett. Because "a dismissal with prejudice is tantamount to a judgment on the merits," these defendants were prevailing parties. Zenith Ins. Co. v. Breslaw, 108 F.3d 205, 207 (9th Cir. 1997), abrogated

on other grounds by AME v. California, 231 F.3d 572 (9th Cir. 2000) (en banc); see Fed. R. Civ. P. 54(d)(1). The depositions need not have been used at trial to be "necessarily obtained for use in the case," 28 U.S.C. § 1920(2); see Aflex Corp. v. Underwriters Lab., Inc., 914 F.2d 175, 177 (9th Cir. 1990), and there is no requirement that witnesses must actually testify in order to be compensated, see 28 U.S.C. §§ 1821, 1920.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL W. CROCKETT,	) No. 99-35687
	) DC No. CV-95-5062-
Plaintiff-Appellant,	) FDB
	)
v.	) ORDER
	)
JOHN SHIELDS, MARK FRENCH, LARRY MOCK, PETER CARDER, ROBERT MASKO, AND JAMES ANDREWS,	)
	)
Defendants-Appellees.	)

Before: RYMER, THOMAS and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

Fed.R.App.P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL W. CROCKETT, Plaintiff, v. JOHN SHIELDS, MARK FRENCH, LARRY MOCK, PETER CARDER, ROBERT MASKO, AND JAMES ANDREWS, Defendants.	)	CASE NO. C95-5062 FDB ORDER

This matter comes before the court upon the defendants' Motion for Summary Judgment, the defendants' Motion to Strike, and both parties Motions for Reconsideration of the Court's order on the plaintiff's Motion to Amend.

Motion for Summary Judgment

The defendants have moved for summary judgment to dismiss the plaintiff's constitutional malicious prosecution claim, First Amendment free speech claim, Fourteenth Amendment Due Process claim and conspiracy claim.

It appears that both parties concede some claims. The plaintiff did not oppose the dismissal of his conspiracy claim under 42 U.S.C. § 1985, or the claim that he was deprived of a constitutional liberty or property interest without due process of law. The defendants "agree that there are issues of fact on plaintiff's free speech claim which would preclude judgment as a matter of law at this stage of the proceedings". See, Defendants' Reply, page 2, lines 7-8. The only portion of the motion left for the Court to decide is regarding the plaintiff's malicious prosecution claim.

To prevail on a claim for malicious prosecution Mr. Crockett would have to show that the defendants prosecuted him with malice and without probable cause, and that the defendants prosecuted him to purposefully deny him a specific

constitutional right. See, Freeman v. City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995). The plaintiff alleges that probable cause to prosecute him did not exist. The defendants assert that he is collaterally estopped from relitigating this issue and therefore cannot succeed on his malicious prosecution claim. That position is correct.

The analysis centers around whether or not the plaintiff had a full and fair opportunity to litigate the probable cause issue in the state court criminal proceedings. The Ninth Circuit Court of Appeals held that a Nevada plaintiff in a civil rights action "had full and fair opportunity to litigate the issue of probable cause during the course of his criminal prosecution" therefore precluding him from relitigating the issue in the federal court action. See, Haupt v. Dillard, 17 F.3d 285, 290 (9th Cir. 1994). The plaintiff attempts to distinguish Haupt on the basis that "the procedure in Nevada for establishing probable cause is very different from that in Washington" because the Nevada statute provides for a

preliminary hearing on the issue of probable cause while the Washington criminal procedure rules do not provide for a contested hearing to establish probable cause.

Washington Criminal Rule (CrR) 3.2 states, in relevant part,

> Before making the determination, the court may consider an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony, and further may examine under oath the affiant and any witnesses the affiant may produce. Sworn testimony shall be electronically or stenographically recorded. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations, and may be hearsay in whole or in part.

The defendant had a type of hearing proscribed by this rule. A finding of probable cause was entered by the state court judge. The plaintiff conceded the issue and did not contest probable cause. The plaintiff had the opportunity to challenge probable cause at a later time and failed to do so. The state court's finding that probable cause existed is now final. Under these circumstances this Court finds that the issue was fully litigated

previously.

All the elements of collateral estoppel have been met. Since the plaintiff cannot relitigate the issue of lack of probable cause, the malicious prosecution claim must fail. The motion for summary judgment dismissing this claim shall be granted.

Motion to Strike

The defendants have moved to strike portions of the exhibits and affidavits which the plaintiff has submitted in his opposition to the defendants' Motion for Summary Judgment. The portions of the documents which the defendants would like stricken in no way effect the Court's decision on the summary judgment motion. The parties conceded several claims, and the analysis of the malicious prosecution claim centered primarily around Ninth Circuit case law and the Washington criminal rules. The motion, therefore, is moot.

Motions for Reconsideration

On January 10, 1997, this Court entered an Order

granting in part and denying in part the plaintiff's Motion to Amend Complaint. Both parties have moved for reconsideration.

This Court acknowledges, and both parties agree, that it was error to grant the motion insofar as it grants plaintiff leave to name the defendants in their official capacities. In order to correct that error, the defendants Motion for Reconsideration is granted, and the plaintiff's Motion to Amend Complaint shall be denied in it's entirety.

The plaintiff also asks the court to reconsider the portion of the order which states that "any claims brought against the Sheriff's Department would be subject to dismissal" and the conclusion that "amending the complaint to add them as a defendant would be futile". See, Plaintiff's Motion for Reconsideration, page 2, lines 13 - 14.

LR 7(e) states that:

> Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in

> the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

The plaintiff does not meet the requirements of the rule, therefore, his motion for reconsideration is denied.

Based on the above, it is hereby

ORDERED:

(1) Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part. The plaintiff's claims for malicious prosecution, due process, and conspiracy shall be dismissed;

(2) Defendants' Motion to Strike is DENIED as MOOT;

(3) Defendants' Motion for Reconsideration is GRANTED. The plaintiff's Motion to Amend Complaint is DENIED in its entirety;

(4) Plaintiff's Motion of Reconsideration is

DENIED.

DATED this ___ of _____, 1997.

_____
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL W. CROCKETT, Plaintiff, v. JOHN SHIELDS, MARK FRENCH, LARRY MOCK, PETER CARDER, ROBERT MASKO, AND JAMES ANDREW, Defendants.	CASE NO. C95-5062 FDB ORDER GRANTING DEFENDANT FRENCH'S MOTION FOR J.N.O.V.

The remaining defendant, Mark French, renews his motion pursuant to Fed. R. Civ. P. 50 for judgment as a matter of law and requests that the court enter judgment in his favor notwithstanding the verdict; alternatively, he requests a new trial pursuant to Fed. R. Civ. P. 59 and/or a remittitur of

$350,000.00 from the $352,663.00 awarded by the jury as past economic damages to the $2,663.00 that was the only evidence of past economic damages presented at trial.

Defendant French argues that he is entitled to judgment as a matter of law pursuant to Rule 50(b) for three independent reasons: (1) Plaintiff's letter is not protected speech under the circumstances of this case; (2) Mr. French is entitled to qualified immunity because the First Amendment's application to the letter was not "clearly established" in the context of this case; and (3) there was insufficient evidence to establish the essential element of a causal link between the letter and Mr. French's conduct, or to establish that such conduct was a proximate cause of damage to the plaintiff.

Plaintiff responded to Defendant French's motion by setting forth his view of the facts, for example, the Plaintiff loved his job and loved his Department, that French kept a "pay back file," that Plaintiff had an insubordinate squad, and that Inspector Robert Van Gieson was "tainted" by the

inappropriate input from Defendant French, and that Van Gieson forwarded his recommendation to Sheriff John Shields who ultimately disciplined Plaintiff. On the law, Plaintiff argues by simply stating that the correct ruling is that the anonymous letter is speech protected by the First Amendment. Plaintiff concludes by stating that it is ridiculous for Defendant French to argue now for summary judgment in his favor after conceding in December 1996 that issues of fact precluded summary judgment, and that it is outrageous to cite so extensively from *Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1998). As for a new trial, Plaintiff asserts the verdict should stand, unless the Court concludes that the verdict is excessive.

Now the Court has the benefit of both the evidence adduced at trial as well as the teachings of *Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1998), the Court concludes that Defendant French is entitled to judgment as a matter of law pursuant to his renewed motion under Fed. R. Civ. P. 50.

ARGUMENTS AND CONCLUSIONS

A. DETERMINATION OF PROTECTED SPEECH

1. Plaintiff's letter is not protected speech.

It is for the court to decide whether particular speech is protected or not - that is, whether it is a matter of public concern - and in doing so, it must look at the content, form, and context of a given statement as revealed by the whole record. *Connick v. Meyers*, 461 U.S. 138, 146-48 (1983). *Connick* explains:

> [W]hen a public employee speaks not a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior . . .

Id. 146-47.

On its face, the anonymous letter appears to be protected speech in that it addresses issues at the heart of the political process - the fitness of candidates for the office -

most assuredly a matter of public concern. On closer scrutiny, however, with reference to the evidence at trial and to *Connick* and the balancing test from *Pickering v. Board of Education*, 391 U.S. 563 (1968), a different conclusion is required.

The evidence at trial revealed the context in which the anonymous letter was written to the County Council. Plaintiff had been having difficulties with the officers he supervised, there had been a complaint of racial/sexual harassment against him, and his supervisors had been critical of his conduct and his abilities to supervise others. The anonymous letter was written not simply in the context of the forthcoming appointment of a new sheriff, but was written in the context of Plaintiff's employment concerns. He directed his negative comments toward those whom he feared could threaten his continued employment - Mark French and Steve Poythress. It is appropriate to consider an employee's motivations in determining whether speech is a matter of public concern or merely a private dispute. *See Breuer v. Hart*, 909 F.2d 1035,

1038-39 (7th Cir. 1990) (speech motivated by personal animus or narrow self-interest may in itself strongly suggest that the speech involved is merely a private dispute); *Coughlin v. Lee*, 946 F.2d 1152, 1157-58 (5th Cir. 1991) (speech not a matter of public concern where motive was to embarrass the sheriff politically); *McEvoy v. Shoemaker*, 882 F.2d 463, 466 (10th Cir. 1989) (complaints of mismanagement in the police department merely aired personal frustrations of promotional decisions and did not involve matters of public interest.) Plaintiff was asked directly by Captain Gary Smith on March 20, 1992 what his motivation was in writing the letter, and he explained that it was the personnel dispute between himself and his superior that was his primary motivation for writing the letter:

> Q What, what was it that motivated you to do that?
>
> A Well, it was, it was, it was a couple things. It was, I guess it was a year long thing that's been going on with me and Captain

> French and Steve Poythress. [Uh], of course we all mentioned, it's all been mentioned about the Doris Clark incident and the investigation. I think probably the biggest thing was, was that I received a threat from Captain French and a threat from Steve Poythress which I took as threat on my job. Um, [uh], and I had contacted several people over those threats and got, you know, nothing happened. And I guess with my own way of looking at it and I'm not saying it's the right way. But my own way of looking at it, that, um, if they were going to have me, or get me fired, is what I believe the threats to be, as a Chief and a Captain, then I thought was well what's gonna happen if they were the sheriff. [Uh], especially when they have the final decisions so that was probably the biggest reason. [Uh], the biggest, I mean the, that's the things that's been, what I thought about for quite a while.

(Exhibit 88, p. 3). While Plaintiff testified at trial he was concerned about the Sheriff's Department as well as himself

when he wrote the letter, given the underlying employment problems Plaintiff was having, his most candid statement, more probably than not, was the above statement, which was made closer in time to the incident, in a context where he was compelled to testify truthfully, and where his personal bias in the outcome of a trial was not part of the equation. It is true that there is a legitimate public interest in a candidate's character and fitness to serve as a sheriff, but this concern is only part of the entire record at which a court must look. Plaintiff's concerns with his employment and his history of genuine employment problems in the Sheriff's Department cannot be ignored. These employment problems are large - even the dominating - factors in establishing the context and motivation for the letter. These employment problems combined with Crockett's admission of his motivation, and the fact that the rumors about French that he revived were about two years old, all point toward his being an employment dispute and a matter of personal animus between Crockett and

French, rather than a matter of genuine public interest.

2. *Pickering* balancing test.

But even if the letter arguable touched a matter of public concern, the inquiry does not end there. The Court must engage in the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Connick* 461 U.S. at 151-52. Speech that is a matter of public concern will not be protected if the plaintiff's interest as an employee in commenting upon a matter of public concerns does not outweigh the interest of the public body as employer in promoting effective and efficient public service. *Connick, id.* In performing the balancing test, the Court should consider the following elements: (1) whether the speech impeded the employee's ability to perform his responsibilities, (2) the importance of close working relationships with superiors and co-workers, (3) the time, place, and manner in which the speech was delivered, (4) the context in which the underlying dispute arose. *Id.*, at 154. Also, the falsity of the speech and

whether it was made knowingly or with reckless disregard for the truth is a matter to be considered in applying the *Pickering* balance of interests. *Johnson v. Multnomah County*, 48 F.3d 420, 423-24 (9th Cir. 1995).

a. Context, time, place and manner

The context in which the letter was written has already been discussed above, and weighs most heavily against protecting the speech: Plaintiff's problems with the deputies under his supervision, the complaints of race and sex discrimination, his commanding officers' concerns with his supervisory skills all underlay Plaintiff's concerns for keeping his job. Thus, an anonymous letter to the Council attacking those whom he considered most dangerous to his continued employment should either become sheriff, does not represent speech deserving of protection. Plaintiff wrote the letter at a time when he had serious, personal employment concerns at a time when his unsubstantiated allegations would have the greatest impact, during the period when the County Council

was considering the candidates for Sheriff. The allegations were made in an anonymous letter, a vehicle that could allow an unknown person, without fear of reprisal, to allege old, unsubstantiated allegations that could affect certain candidates' viability. The time, place and manner of his speech in this context weighs against a determination that this speech is protected.

b. Importance of close working relationships with superiors and co-workers

The importance of close working relationships with superiors and co-workers is paramount in law enforcement as a matter of common sense. The Ninth Circuit has held that "a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees." *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1038 (9th Cir. 1990). In recognizing the interest of law enforcement agency in developing "discipline, esprit de corps, and uniformity" within the ranks, *see Kelley v. Johnson*, 425 U.S. 238 (1976),

courts have addressed employees' speech in this context: *Breuer v. Hart*, 909 F.2d 1035, 1041 (7th Cir. 1990)("[s]peech that might not interfere with work in an environment less dependent on order, discipline, and esprit de corps could be debilitating to a police force."); *Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983)(a law enforcement agency has a significant governmental interest, more so than the typical governmental employer, in regulating the speech activities of its officers).

Here, Plaintiff has accused a supervisor of beating his wife and using drugs. Plaintiff admitted that allegations such as these undermine a supervisor's authority and ability to maintain the respect of the rank and file. The insidious result of concluding that Plaintiff's anonymous letter is protected speech under the circumstances would be to loose the restraints on unscrupulous employees having employment problems, allowing them to implicate public concerns in their speech so as to achieve First Amendment protection, thus

providing a means to falsely accuse their supervisors in order to undermine their authority, and all for these employees' own private purposes.

In *Breuer v. Hart*, 909 F.2d 1035 (7th Cir. 1990), a deputy sheriff was terminated after he had gathered information about an employee whom he believed was receiving special, favorable treatment and gave the information to the County Attorney who later concluded he could not base a criminal prosecution on the allegations. The *Breuer* Court, citing *Connick*, held that the employer did not need to wait until all working relationships disintegrated before taking action. The Court stated:

> Using the approach urged by Breuer would insulate even the most disruptive employee from termination so long as the employee makes an allegation not frivolous on its face to appropriate authorities before his termination.

Breuer at 1040. Plaintiff Crockett's position in this case is weaker than the Plaintiff's in *Breuer*, because Crockett admitted that he had no basis to believe that the old gossip that

was investigated in the past and determined to be unfounded was now true. Plaintiff also admitted that such false accusations undermine a superior's ability to do his job in supervising the officers in his department. Plaintiff's speech does not outweigh the Sheriff's Department's interest on this element of maintaining close working relationships.

c. Falsity or reckless disregard of falsity

In *Johnson v. Multnomah County*, 48 F.3d 420, 423-24 (9th Cir. 1995), the Ninth Circuit held that recklessness as to the truth of the speech should be considered as one of the factors in the *Pickering* balance of interests. The Ninth Circuit noted that there was a split among the circuits as to whether, under *Connick*, recklessly false statements are per se unprotected or whether the recklessness should be considered one of the factors in the *Pickering* balance of interests. The Ninth Circuit chose to follow the line of cases reasoning that recklessly false statements are part of the balancing test, and

noted the Supreme Court's statements:

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

Johnson at 424. Nevertheless, the Ninth Circuit went on to note other Supreme Court statements that while false statements are not deserving in themselves of constitutional protection,

> "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive." *New York Times v. Sullivan*, 376 U.S. 254, 271, 271-72 (1964).

Johnson at 424. Thus, analogizing to recklessly false statements in the defamation contexts, the Circuit concluded that recklessly false statements should be considered as part of the *Pickering* balancing test.

Plaintiff conceded in his trial testimony that he had no personal knowledge of the truth of statements he made in the

letter, nor was he aware of anyone who did have personal knowledge of the truth of the statements he made. Moreover, he also knew that these rumors had surfaced in the past, about two years prior, had been investigated, and were determined to be unfounded. Plaintiff never attempted to verify the allegations he made in his letter. Against the background, Plaintiff at the very least made the statements recklessly. His conduct under these circumstances reinforces the private nature of his concerns as to Defendant French. Furthermore, the nature of the statements is such that they would most assuredly undermine morale and esprit de corps of law enforcement agency. In fact, Defendant French testified that the statements hurt and frustrated him, that they undermined his ability to supervise the deputies and at times undermined his credibility with the public, and that, as well, the statements caused his wife to worry a great deal.

The recklessness with which Plaintiff made the statements in the anonymous letter - without personal

knowledge of their truth or falsity, and without any other basis for believing the statements to be true - is another factor that weighs against affording protection to Plaintiff's speech.

The above analysis, pursuant to *Pickering*, demonstrates that the anonymous letter is not deserving of protection under the First Amendment because (1) the time, place, manner, and context of the speech exemplifies an employment dispute rather than contributing to discourse on a matter of public interest, and Plaintiff admitted as much during the Sheriff's internal investigation to determine the author of the anonymous letter; (2) the close working relationships in the Sheriff's Department were affected by the letter, which revived old rumors that had been determined to be unfounded, and undermined French's ability to do his job; and (3) the lack of foundation for the accusations underscores the lack of value to the public discourse about the candidates for sheriff.

B. IMMUNITY

In assessing a public officer's qualified immunity, the Court applies the standard articulated in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which states that public officers acting in their official capacities are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The qualified immunity defined in *Harlow* has been defined quite broadly:

> [I]t provides ample protection to all but the plainly incompetent or those who knowingly violate the law . . . [I]f officers of reasonable competence could disagree on th[e] issue [whether or not a specific action was constitutional], immunity should be recognized.

Malley Briggs, 475 U.S. 335, 341 (1986). The Ninth Circuit has stated: "[R]egardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful."

The officer's conduct that is the subject of scrutiny here is Defendant Mark French's providing Plaintiff Crockett's employee file, which French maintained as Crockett's supervisor, to Robert Van Gieson for possible use in the disciplinary process directed at Crockett regarding the anonymous letter that Crockett had admitted writing.

The Ninth Circuit recently reviewed the process by which a court determines whether a right is "clearly established," *Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1998), and cited the authorities in the following discussion. To determine whether the right asserted by a plaintiff was "clearly established" at the time, the Supreme Court has directed that the inquiry must focus upon the right in a practical, "particularized" sense, not in a general, abstract sense. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Ninth Circuit has similarly observed that "[b]road rights must be particularized before they are subjected to the clearly established test." *Kelly v. Borg*, 60 F.3d 664, 667 (9th Cir.

1995). In *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1992), the Court clearly explained: "[T]he proper focus is not upon the right as its most general or abstract level, but at the level of its application to the specific conduct being challenged."

In order to look at the right asserted, not just a free speech right, but as particularized, specific conduct, the Ninth Circuit has explained that a court must review the manner in which the right is implemented by way of the balancing test first articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968). That is, the Court must balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services that it performs through its employees." *Pickering*, at 568. As the Court stated in *Moran*,

> "... the relevant right is not the generic First Amendment right to free speech. Nor is it the right to be free from speech-based retaliatory discharge. Rather, whether or not Senn violated Moran's "clearly established"

> constitutional rights depends upon the sensitive ad hoc balancing that *Pickering* entails."

Moran at 845.

Thus, the issue is whether or not Defendant French violated a clearly established free speech right belonging to Plaintiff Crockett sufficient to defeat French's assertion of qualified immunity. Even more specifically, the issue is whether Defendant French, in turning over his supervisor's file to a disciplinary investigation committee member, violated a free speech right of Crockett to send to the County Council an anonymous letter containing unsubstantiated, negative material about two candidates for sheriff.

First, as noted earlier, close working relationships are essential in the Sheriff's Department. The matters of preserving morale and esprit de corps have been mentioned. The deputies depend upon one another for personal safety and support. Crockett himself was a supervisor, and it would have been important to his superiors that he could be depended

upon to carry out their commands and policies, as it would have been important for the deputies he supervised to have confidence in him and to follow through on his directions and orders. Crockett's letter undermined French's role, and it could not have helped the already shaky relationship Crockett had with the deputies he supervised.

Second, it is virtually beyond cavil that Crockett's conduct was disruptive in that it undermined the authority of those whom he criticized. French testified that the allegations did undermine his authority. Plaintiff admitted that such false allegations undermine a superior's ability to do his job in supervising officers and make it difficult to keep authority and respect of the rank and file. It is not hard to imagine the difficulty encountered by Crockett's superiors who were the targets of his unfounded charges. Difficulties would also be present for those who were loyal to Crockett's targets. The deputies who worked under Crockett would be concerned about who they could believe, who they could trust, and who

was the honorable person. It is easy to see how the conduct undermined the Sheriff's Department's morale and esprit de corps, which as noted earlier in the discussion under Part A, is of such paramount importance to a law enforcement agency.

Finally, it is appropriate to consider the falsity of the charges alleged. It was not disputed, and Plaintiff admitted that he had no basis to believe the truth of what he asserted, that he had no personal knowledge of the matters asserted, and that he did not know anyone who did have personal knowledge of the matters asserted, as the Court stated in *Moran*, the falsity of his speech may not render it per se unprotected, but its falsity certainly undermines Crockett's First Amendment interest in the balancing process. That Crockett had no basis for believing the truth of the accusations he was making, again tips the balance in French's favor.

Under the foregoing analysis of the specific conduct at issue, it is apparent that Plaintiff's speech does not survive the *Pickering* analysis: Plaintiff's asserted free speech right was

not "clearly established" and cannot defeat Defendant French's qualified immunity. The Court in *Moran* noted the difficulty in finding "clearly established" principles in this kind of situation:

> Because the underlying determination pursuant to *Pickering* whether a public employee's speech is constitutionally protected turns on a context-intensive, case-by-case balancing analysis, the law regarding such claims will rarely, if ever, be sufficiently "clearly established" to preclude immunity under *Harlow* and its progeny.

Moran 147 F.3d at 847. The *Moran* court then went on to note that it was not alone in this observation:

> We are certainly not the first to recognize this self-evident tenet of qualified immunity jurisprudence. Indeed, this court has itself acknowledged, in a slightly different context, the difficulty of divining clearly established legal principles from multifactor balancing tests. *See Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989)(upholding a claim of qualified immunity for social workers who had taken a child into protective custody after noting that the case "involve[d] the difficult balancing of a family's right to autonomy against the state's interest in protecting minor children from abuse"). And today we join the

> chorus of voices from other circuits that have specifically observed the difficulty of finding clearly established law under *Pickering*.

Id. [additional citations omitted.] This is not surprising given the Supreme Court's view of the broad definition of qualified immunity, which was set forth in *Moran* and is worth noting again:

> Under the Supreme Court precedent as it has evolved since the watershed *Harlow* decision, the qualified immunity "defense" has been defined quite broadly: "[I]t provides ample protection to all but the plainly incompetent or those who knowingly violate the law... [I]f officers of reasonable competence could disagree on th[e] issue [whether or not specific action was constitutional], immunity should be recognized." *Malley v. Briggs*, 474 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *see also Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997)("Th[e] test allows ample room for reasonable error on the part of the [government official]."); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991) ("[R]egardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful."). Moreover, the plaintiff bears the burden of proving that the rights she claims

> were clearly established" at the time of the alleged violation. *See Davis v. Scherer*, 468 U.S. 183, 197, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Collins*, 110 F.3d at 1369.

Moran 147 F.3d at 844.

In presenting the file that he kept as Crockett's supervisor to Van Gieson for possible use in the disciplinary process concerning Crockett's writing the anonymous letter, French could have reasonably believed that he was not doing anything improper, that he was only providing additional information that may bear on the matters being considered. The deference given to what a reasonable officer could have believed, could be analogized to the "breathing space" afforded freedom of expression to tolerate mistakes or falsehoods. The question of whether turning over a personnel file to an investigative body was an infringement of Plaintiff's First Amendment right is certainly not as clearly established as the fact that the Plaintiff said in his anonymous letter about Defendant French was baseless; the former was open to

question, while Plaintiff admitted he had no basis for asserting the latter. Defendant French is entitled to some "breathing space" as to conduct he reasonably believed was unlawful. The above *Pickering* analysis mandates the conclusion that Defendant French is entitled to qualified immunity under the circumstances.

In view of the preceding conclusions, the remaining issues need not be addressed. Nevertheless, in the interest of providing a full exposition of the concerns of this case, the matters will be discussed.

C. EVIDENTIARY BASIS FOR THE VERDICT

1. Causation

No evidence was presented at trial that would demonstrate that Defendant French's conduct proximately caused damage to Plaintiff Crockett. There is no evidence that French participated in the internal investigation of Crockett or in Captain Smith's interview of Crockett. The only evidence is that French gave the personnel file he kept on Crockett to

Robert Van Gieson. Importantly, however, there is no evidence that any of the information in French's file on Crockett had any effect on the disciplinary action ultimately taken against Crockett. The only evidence remotely touching on this issue was former Sheriff John Shield's testimony that French had absolutely no role in his disciplinary decision. The element of causation was not established, and the Jury's verdict could only be based on impermissible speculation.

2. Past economic damages

The sole evidence of past economic damages, or lost wages, was that Plaintiff Crockett was suspended from his employment for 15 days and lost $2,663.00 as a result. These damages were not disputed, they were the only economic damages sought, and Plaintiff continued with his employment after he was disciplined for the anonymous letter. The Jury's award of $352,663.00 for past economic damages is not based on the evidence and is clearly excessive in view of the amount Plaintiff sought to recover.

When a party seeks a new trial on the issue of damages only , the court may grant the motion and order a new trial, deny the motion and reinstate the judgment, or grant a remittitur with the alternative of a new trial if the remittitur is not accepted. *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983). If it were not for the Court's conclusions that Plaintiff's speech is not entitled to protection and that Defendant French is entitled to qualified immunity, then on this issue the Court would conclude that a reduced award is appropriate, or, if Plaintiff does not accept the reduced award, a new trial. Specifically, since Plaintiff's maximum recovery could have been $2,663.00, and the Jury awarded $352,663.00, this Court would grant a remittitur of $350,000.00. If Plaintiff Crockett refuses to remit, then a new trial would be granted.

As stated earlier, however, the Court's decisions in Parts A and B resolve the matter in favor of Defendant Mark French in determining that Plaintiff Michael Crockett's speech

was not entitled to protection under the Constitution and in determining that Defendant French is entitled to qualified immunity.

ACCORDINGLY,

IT IS HEREBY ORDERED:

(1) Defendant Mark French's Motion for Judgment N.O.V. is Granted,

(2) The Jury's Verdict is set aside, except as to Defendant Mark French's malicious prosecution counterclaim, and

(3) The Clerk shall enter Judgment in favor of Defendant Mark French on the Plaintiff's claim, but for the Plaintiff on Defendant French's malicious prosecution counterclaim;

(4) Plaintiff's Motion for Attorneys Fees and costs and for J.N.O.V. and/or New Trial are DENIED as MOOT.

DATED this 4th day of May, 1999.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

APPENDIX E

THE UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

42 USC § 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.